(2)

NO. 88-80

in the

Supreme Court

of the

United States of America

OCTOBER TERM, 1987

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Petitioners,

vs.

FRED STANTON SMITH, Trustee
of the Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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ISSUES PRESENTED

I.

Does this Court lack jurisdiction?

II.

Did the lower courts correctly apply the doctrines of substantive consolidation and equitable estoppel to the facts of the case?

III.

Did the rulings of the lower courts violate certain rules of the Federal Rules of Civil Procedure?

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INTRODUCTION

The Petitioners are two of five affiliated debtors in consolidated bankruptcy proceedings below, who have

presented their various claims and arguments over the past four years to:

Two different Bankruptcy Judges;

Ten different District Judges in over twenty separate appeals; and

Eight Judges of the United States Court of Appeals in four separate appeals and a Petition for Writ of Prohibition and Mandamus.

Petitioners, along with three other affiliated debtors, have also filed another Petition for Writ of Certiorari and a Petition for Writ of Mandamus—both of which are currently pending before this Court.[1]

STATEMENT OF THE CASE

The opinion of the Eleventh Circuit upon which review is sought herein[2] was the culmination of proceedings below initiated by an Emergency Motion for Clarification filed in the Bankruptcy Court to collaterally attack the Bank of New York's (the "Bank") confirmed plan of reorganization (the "Plan"). The Petitioners, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould") along with three other related debtors—Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") (collectively the "Debtors")—filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code on August 22, 1984. The Bankruptcy Court granted the Debtors' motion for joint administration.

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[1]Case Nos. 87-1988 and 87-1989. References to the Petitioners' appendix will be denoted as "____a," and references to the appendix to this Response will be denoted "App. ____."

[2]Opinion of March 18, 1988 in *Holywell Corp. v. Smith*, Case No. 87-5195. [3a].

The filing of the petitions automatically stayed the then-pending state court foreclosure suit brought against some of the Debtors by the Bank, as well as approximately 30 lawsuits and lien proceedings against the Debtors brought by contractors, suppliers, another bank, the IRS, the Dade County Tax Collector, Gould's partners, and others. 11 U.S.C. § 362. Over 400 creditors held claims totalling over $350 million.

The Debtors and the Bank filed competing reorganization plans in the bankruptcy proceedings.[3] The creditor committees and individual creditors overwhelmingly

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[3]As the Eleventh Circuit aptly noted: "Although the five debtors submitted individual plans, the plans were virtually identical." *Miami Center Ltd Partnership v. Bank of New York*, 820 F.2d 376, 377 n.1 (11th Cir. 1987).

Pursuant to Supreme Court Rule 28.1, the following is a listing of the relationships of The Bank of New York.

1. Parent of the Bank—The Bank of New York Company, Inc.

2. "Affiliates" of the Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.V.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

approved the Bank's Plan and rejected the Debtors' plans. The Bankruptcy Court subsequently confirmed the Bank's Plan, over the objection of Debtors and Debtors' affiliated entities' objections (the "Confirmation Order").

Gould owned 100% of the stock of Holywell and also served as President and a director of Holywell. In turn, Holywell owned 100% of the stock of MCC; Gould and MCC were the sole general partners of Chopin and of MCLP. All five Debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

Holywell owned many subsidiaries other than MCC. One such non-debtor subsidiary, wholly-owned by Holywell, was Twin Development Corporation ("Twin"). Gould served as President and as a director of Twin.

The Bank was the construction lender for the Miami Center Project and held a secured claim in the bankruptcy proceedings for over $240 million. In a pre-confirmation adversary proceeding to establish its lien, the Bank obtained a judgment for over $234 million as of March 14, 1985, with interest accruing at over $2 million per month thereafter. [App. A].

The Petitioners' statement of the case omits much of the relevant proceedings below and is inaccurate in numerous respects, particularly as it relates to (1) the interests in the Washington Properties (as defined herein), and (2) certain provisions of the Plan.

(1) Pursuant to a Hypothecation and Security Agreement dated May 14, 1981, by and between Gould, MCLP, and the Bank, as amended, Gould hypothecated to MCLP, and MCLP, as security for all present and future obligations to the Bank in connection with the Miami Center

Project, pledged to the Bank, *inter alia*, all right title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner from 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, and Eleven Dupont Circle Associates. These entities owned interests in real estate located in the Washington, D.C. area (the "Washington Properties"). A copy of the Hypothecation and Security Agreement dated May 14, 1981 and all amendments and modifications became part of the record as Exhibit "A" to the Bank's cash collateral motion. [App. C-20].

Pursuant to an Assignment and Security Agreement dated October 14, 1983, Gould created in favor of the Bank as security for all of Gould's obligations to the Bank, *inter alia*, a security interest in all of the "collateral" described in the Hypothecation and Security Agreement, dated May 14, 1981 as amended. A copy of the Assignment and Security Agreement dated October 14, 1983, became part of the record as Exhibit "D" to the Bank's cash collateral motion. [App. C-65].

Pursuant to an Assignment and Security Agreement, dated June 23, 1983, as amended, Holywell, as collateral security for Holywell's obligations in connection with the Bank loans, assigned to the Bank and granted the Bank a first priority security interest in, *inter alia*, (i) all right, title and interest of Holywell (including, without limitation, any interest obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all monies due and/or to become due to Holywell as a general or limited partner of 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates, and Dupont Land Associates; (ii) all right, title and interest of Holywell in and to 10 shares, constituting all of the issued and outstanding capital stock of Twin and all the stock of certain other Holywell subsidiaries. A copy of

the Assignment and Security Agreement dated June 23, 1983 and all amendments became part of the record as Exhibits "B" and "C" to the Bank's cash collateral motion. [App. C-41 and C-63].

By virtue of the Debtors' default under the loan documents, including the stock pledge, the Bank had the right to exercise all rights of ownership that Holywell held over the Twin stock and assets, including the proceeds of the sale of the Washington Properties (the "Washington Proceeds"). [App. D-22-26].

On October 1, 1984, Gould and Holywell admitted their ability to control Twin by seeking Bankruptcy Court approval to sell the Washington Properties. [App. E]. Because Twin was an asset of Holywell and subject to the security interest of the Bank and subject to the jurisdiction of the Bankruptcy Court pursuant to Section 541(a) of the Bankruptcy Code, Holywell and Gould sought Bankruptcy Court approval to dispose of Twin's sole asset—its interest in the Washington Properties.

In their motion seeking approval of this sale, the Petitioners represented to the Bankruptcy Court and to hundreds of creditors, including the Bank:

> Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale *which inures to Holywell and Gould* will provide *the Debtors* with capital much needed as an essential part of the reorganization sought in these proceedings.

(Emphasis added). [App. E-3]. Thus, contrary to Petitioners' statement (Petition, page 4), Holywell and Gould represented and admitted that they would control or use Twin's share

of the net proceeds of sale, ultimately $13.1 million (the "Twin Cash"). The Twin Cash was part of the net sales proceeds—approximately $32 million in net proceeds.

The Bankruptcy Court approved the sale, with the proviso that the proceeds of the sale would be segregated and held, "subject to further Order of this Court." [17-20a]. Neither the Petitioners nor Twin appealed that order.

Thereafter, the Bankruptcy Court granted the *Bank's motions*:

(a) requiring the Petitioners to deposit the sales proceeds (including the Twin Cash) into separate accounts subject to further order of the Bankruptcy Court [17-20a; App. B-1]; and

(b) declaring that all such proceeds constituted "cash collateral" of the Bank (the "Cash Collateral Order"). [21-24a; App. C-1].

Petitioners suggest that these orders distinguish between the proceeds due Holywell and Gould from the proceeds due Twin. (Petition, pages 4-5). The Bankruptcy Court made no such distinction. Neither the Petitioners nor Twin appealed those Orders.

The Debtors filed Schedules and Statements of Affairs listing their respective assets and liabilities. They disclosed that Twin functioned solely as a holding company for Holywell, its sole asset was its interest in the Washington Properties and Twin had no liabilities. The absence of any liabilities on the part of Twin is shown by the Petitioners' scheduling Twin's value as the exact amount of Twin's share of the Washington Proceeds. [App. P].

In its disclosure statement, Holywell represented to the Bankruptcy Court and the creditors that all of the

Washington Proceeds, including the Twin Cash, would be used to pay the claims of creditors. [App. F-6].

Under the Bank's Plan, the Bank's cash collateral, including the Twin Cash by virtue of the Cash Collateral Order were to be used to pay the claims of hundreds of creditors. Although the Debtors and various related entities filed objections to the Bank's Plan, neither Twin nor the Petitioners filed any objection to the use of Twin Cash. Twin did not take an appeal from the Confirmation Order.

The Bankruptcy Court's Orders required both the Debtors and the Bank to file certificates as to the voting by creditors and the source of cash to fund their respective plans. On May 13, 1985, Petitioners certified that $14,738,000 was available to fund the Debtors' proposed plans, including the Twin Cash. [App. I]. In so certifying, the Debtors again evidenced their complete control over the Twin Cash and admitted that such funds would be used under any plan of reorganization to pay creditors.

The Debtors failed to obtain a stay pending review of the Confirmation Order. On October 10, 1985, implementation of the Plan began. The liquidating trustee appointed pursuant to the terms of the Confirmed Plan (the "Liquidating Trustee"), marshalled all of the Bank's cash collateral that had been realized as part of the sale of the Washington Properties [App. G-11, 23, and 30], and used those funds to pay creditors. In addition, Holywell's property within the meaning of section 541(a) of the Bankruptcy Code, including Holywell's interest in Twin, became part of the Miami Center Liquidating Trust (the "Liquidating Trust").

After substantial consummation of the Plan, Gould, despite lacking any interest in Twin, filed a motion in the Bankruptcy Court to claim, for the first time, that the Twin Cash could not be used to pay creditors under the Plan. The

Liquidating Trustee, who owned all of the stock of Twin, opposed that claim and never authorized the Petitioners to assert any claim against the assets of Twin. [App. D].

The Bankruptcy Court and the District Court both concluded that Twin had transferred the Twin Cash to Holywell and Gould, that the Twin Cash was an asset of Holywell under Section 541(a) of the Bankruptcy Code, and that only the Liquidating Trustee could disburse those funds. [15a].

Prior to the confirmation, Twin had never appeared separately before the Bankruptcy Court. Its president and director was Gould, and Holywell owned 100% of Twin. As a holding company for Holywell, any asset of Twin was subject to the total control and disposition by Holywell and Gould. The Bank held security interests in Twin and in Twin's interest in the Washington Proceeds. Upon filing their petitions in bankruptcy, the assets of Holywell and Gould, which included the Twin stock and any interest in the Washington Properties, became subject to the control and jurisdiction of the Bankruptcy Court. The Plan specifically addressed the use of the Twin Cash and the other assets of the Debtors for payment of the claims of creditors.

(2) The Petitioners' description of the Plan's provisions is inaccurate in the following respects:

(a) In describing the Plan's provisions for dismissal of the Debtors' civil action against the Bank, Petitioners omitted reference to a judicial determination that releases signed by the Debtors in 1983 and 1984 barred those claims. *In re Holywell Corp.*, 49 Bankr. 694 (S.D. Fla. 1985). (Petition, page 8).

(b) The Plan provided for the sale of the Miami Center Project with interest on the mortgage debt computed at the

pre-default rate rather than at the substantially higher default rate.[4]

(c) The Plan did not provide for the "[t]aking of chattels which were not the property of the Debtors' estates, owned by non-filed solvent affiliated creditors." (Petition, page 8). The Bankruptcy Court, the District Court, and the Eleventh Circuit have all determined that the Plan provided for the purchase of chattels. The Trustee sold those chattels to the Bank as part of the Plan's purchase price.

(d) There has never been any judicial determination that the Bank subordinated insider claims totalling "$26,123,498" (Petition, page 8), nor is there any basis for that allegation in the record below.

(e) The Plan dealt with the "super-priority loans" and the tax claims. The super-priority loans (which were, in fact, inter-debtor loans) were dealt with in Article II of the Plan.[5] Tax claims were dealt with in Article III of the Plan.[6] There is no record support for the Petitioners' bald allegation that unpaid income taxes are $20,763,841. (Petition, page 9). At the time of confirmation of the Plan, there were no pending tax claims that the Plan did not cover. The Petitioners failed to disclose or deal with any such claims in their plans filed in 1985.

In footnote 4 on page 10 of the Petition, the Petitioners imply that in a separate appeal brought by the "Miami Center Joint Venture" and its partners, the District Court

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[4]On page 8 of the Petition, the terms "accrued unmatured interest" is inaccurate. The interest credit taken at closing pursuant to the Plan represented fully accrued and matured interest to the closing date.

[5][App. H-10].

[6][App. H-10].

reversed *in toto* the Confirmation Order. The reversal and remand was directed to *only one claim* for which contingency the Plan had specifically provided. That claim was given a special mechanism for payment. [App. J-15-16]. The balance of the Plan and Confirmation Order remain intact.

ARGUMENTS AGAINST GRANTING THE WRIT

The Eleventh Circuit, in rejecting the Petitioners' appeal of the District Court's order affirming the Bankruptcy Court's decision that the Liquidating Trustee was the only party entitled to the use of the Twin Cash held as follows:

> The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants other claims on appeal are frivolous.

I.

Lack of Jurisdiction

A.

Petitioners Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction

The Petitioners have failed to establish any of the considerations governing review on certiorari as set forth in Rule 17 of the Supreme Court Rules. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered." Sup. Ct. R. 17.1. The failure to point to any

conflict or any important question of federal law weighs heavily against jurisdiction in this matter.

B.

The Petition Is Moot

This Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated.[7] *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, and Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation, the mootness doctrine promotes an important policy of bankruptcy law—that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

Accordingly, the Eleventh Circuit dismissed the Debtors' appeal from the Confirmation Order as moot, ruling that the Plan has been substantially consummated and that it would be "legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo." *Miami Center Ltd Partnership v. Bank of New York,*

[7]Currently pending before this Court, in Case No. 87-1988, is the Debtors' (including these Petitioners) Petition for Writ of Certiorari. In that Petition and the Bank's Brief in Opposition, the issue of mootness is fully examined. The analysis there is equally applicable here and dictates the denial of the Petitioners' instant Petition as moot.

838 F.2d 1547, 1554 (11th Cir. 1988). Likewise, this Court should deny this Petition as moot.

C.

Petitioners Lack Standing

Pursuant to the specific terms and conditions of the Plan, all of Holywell's property within the meaning of Section 541(a) of the Bankruptcy Code, including all interests of Holywell in Twin, vested in the Liquidating Trust. Prior to confirmation, Twin did not take appropriate steps to protect its appellate rights; it left that task to its debtor/parents, Gould and Holywell, who have never taken any appeal on behalf of Twin.

In order to have proper standing to pursue an appeal, a party must have an interest which is directly and adversely affected by the order which is being appealed. *R.T. Vanderbilt Co. v. OSHA Review Comm'n*, 708 F.2d 570, 574 (11th Cir. 1983); *In re Fondiller*, 707 F.2d 441, 442-43 (9th Cir. 1983); *In re Goodwin's Discount Furniture, Inc.*, 16 Bankr. 885, 887-89 (B.A.P. 1st Cir. 1982); *In re Johns-Manville Corp.*, 68 Bankr. 618, 623-24 (S.D.N.Y. 1986); *In re Evans Prods. Co.*, 65 Bankr. 870, 874 (S.D. Fla. 1986); *In re Sweetwater*, 57 Bankr. 743, 746 (D. Utah 1985).

In this case the "order appealed from" is the order of the Bankruptcy Court on Gould's Emergency Motion for Clarification. That order held that pursuant to the Plan, the Liquidating Trustee was authorized to use the Twin Cash to pay creditors of the estate. All of the Washington Proceeds, as well as all the Section 541(a) assets of the Debtors vested in the Liquidating Trustee on October 10, 1985. Holywell and Gould have failed in their attempt to reverse the Confirmation Order. Thus, because the Confirmation Order

and Plan extinguished Holywell and Gould's interests in the Twin Cash, they do not have standing to pursue this Petition.

II.

The Lower Courts Correctly Applied The Substantive Consolidation And Equitable Estoppel Doctrines

The Petitioners, in an attempt to fabricate or create the appearance of a conflict among the various circuits, have erroneously asserted that the primary issue in this case is the improper exercise of jurisdiction by the Bankruptcy Court over the asset of a non-debtor. This argument is factually and legally wrong and ignores the true issue, i.e., the conduct of Twin, Holywell and Gould that led the District Court to rule that substantive consolidation of non-debtor assets had not occurred and that the Petitioners were estopped from contesting the use of the Twin Cash.

A.

Substantive Consolidation

In essence, the Petitioners argue that the Bankruptcy Court in effect sanctioned the substantive consolidation of Twin with the Debtors. The Petitioners have turned a blind eye to the record below. The distinct and separate corporate identity of Twin is a non-issue in light of the actions of Twin, Holywell and Gould in transferring the Twin Cash into the Debtors' estates.

The Bankruptcy Court's order on Gould's Emergency Motion for Clarification which gave rise to this Petition certainly did not provide for the consolidation of Twin with the Debtors; it simply rejected the Petitioners' argument that the Liquidating Trustee could not use the Twin Cash to pay

creditors. The Liquidating Trustee's confirmed right to use the funds is specifically set forth in the Plan.

The Bank's Plan *did not* substantively consolidate the assets of Twin with those of the Debtors. Substantive consolidation occurs pursuant to Section 105 of the Bankruptcy Code, and as to Twin, consolidation, never occurred here. 5 *Collier on Bankruptcy* ¶1100.06[1] at 1100-32 (15th Ed. 1985). The Plan authorized the Liquidating Trustee to use the Twin Cash to pay creditors, based upon two facts: (a) the Twin Cash became available to pay creditors, just as Gould and Holywell represented it would and as they had represented by their conduct; and (b) the Liquidating Trustee became the owner of all of Holywell's interests in Twin pursuant to the terms of the Plan. With that ownership came the right to use the Twin Cash in accordance with the Plan.[8]

As indicated above, Gould and Holywell transferred the Twin Cash into their estates to give them liquidity and to induce creditors to vote for their proposed plans (which, like the Bank's Plan, provided for the use of the Twin Cash to pay creditors). Consequently, the Petitioners' argument of procedural and substantive due process violations (Petition, page 18), lacks substance.

B.

Equitable Estoppel

The facts supporting the District Court's invocation of equitable estoppel were in the record before the District Court below and were thoroughly briefed by the Bank in its Answer Brief. [App. K]. The record before the District Court amply supported the District Court's conclusion that the three

[8]With that ownership also came the right to direct any litigation on behalf of Twin. The Petitioners are now pursuing a claim against the Twin Cash without any authorization by Twin itself.

elements of equitable estoppel, as correctly set forth in the District Court's opinion, were present.[9]

The Petitioners argue that the representations made in the Emergency Motion For Clarification (Petition, pages 25-26) referred to funds of Holywell and Gould that were separate from the proceeds to be received by Twin. Such a position is contradicted by the very language of the motion, in which the Petitioners sought:

> an order authorizing and approving the *sale by Holywell and Gould of certain real and personal property owned by Holywell and Gould* as partners and stockholders in Twin (and non-debtor partnerships).

(Emphasis added). [App. E].

The Petitioners' argument, that the reference to "cash infusion" was limited to any distribution due Gould and Holywell from the partnerships and did not include the Twin Cash, is also without merit. No such distinction was ever made by the Petitioners prior to the Emergency Motion for Clarification. Further, in light of the subsequent orders of the Bankruptcy Court to segregate *all* funds from the sale of the Washington Properties, including any part otherwise allocable to Twin, neither the Bankruptcy Court, the creditors, nor the Debtors recognized such a distinction. These orders were never appealed.

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[9]The elements of equitable estoppel are:

> (1) words, acts, conduct, or acquiescence causing another to believe in the existence of a certain state of things;
>
> (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; and
>
> (3) detrimental reliance by the other party upon the state of things so indicated.

In re Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982).

It must be noted that after the sale, all corporate activity of Twin ceased. Twin's only asset, its interest in the Washington Properties, had been sold. The cash proceeds from that sale were readily available to Twin's sole shareholder, Holywell, and had been pledged to the Bank pursuant to the above-described security agreements. The District Court's interpretation of the Debtors' statement—that this cash was to be available to creditors—is consistent with basic principles of bankruptcy law. It is contrary to basic principles of bankruptcy law that an asset of Holywell, worth over $13 million dollars, would remain outside the reach of creditors of the estate of Holywell, particularly when Gould and Holywell voluntarily transferred the Twin Cash to Holywell's estate and thus submitted it to the jurisdiction of the Bankruptcy Court.

The Petitioners' argument (Petition, page 26) that the use of the funds was limited to the Debtors' proposed plans is also meritless. At the time of the sales, the Debtors had not submitted a disclosure statement or plan of reorganization. As is evident from the orders regarding the sale of the Washington Properties, the Bankruptcy Court recognized that *all* of the Washington Proceeds, including the Twin Cash, were the cash collateral of the Bank [21a], and that those funds were not subject to discretionary use by the Debtors.

Early in the bankruptcy proceedings, the Petitioners filed Schedules and Statements of Affairs listing their respective assets and liabilities. In Holywell's Schedules, Holywell admitted its *100% control over* Twin and the *absence of any liabilities* on the part of Twin by scheduling Twin's value as $13,210,000, coincidentally the exact amount of the proceeds due Twin from the sale of the Washington Proceeds. [App. P].

The Debtors submitted five nearly-identical disclosure statements and proposed plans of reorganization. The

Holywell disclosure statement represented that all of the sale proceeds of the Washington Properties, including any proceeds otherwise allocable to Twin, would be available to pay creditor claims. [App. F-6].

On May 13, 1985, Petitioners' counsel of record certified that $14,738,000 was available to fund the Debtors' proposed plans, including funds in the "Twin Development Trust Account" at Florida National Bank. [App. I].

The District Court also relied upon statements made by Gould under oath [App. L] in response to questions concerning the use of the Washington Proceeds received by Twin:

> Q. Twin Development Corporation?
>
> A. It's a wholly-owned subsidiary of Holywell.
>
> Q. What does it do?
>
> A. It owned the general partnership in 1300 North 17th Street.
>
> Q. That had something to do with the Washington property?
>
> A. It is one of the buildings in the Washington area.
>
> Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?
>
> A. *It has to go to Holywell as dividends.*

(Emphasis added).

The Petitioners argue that such testimony does not support the District Court's findings. That testimony, however, was given during a Bankruptcy Rule 2004 Examination *just after the sale of the Washington Properties.* When viewed in the proper context—i.e., as part of an examination concerning the assets available to the Debtors from the sale of the Washington Properties—the District Court properly concluded that the testimony provided further evidence that any funds derived by Twin from the Washington Properties were part of the Debtors' estates.

The District Court also cited examples of the Petitioners' misrepresentation by their acquiescence. [10-11a]. The District Court pointed to the absence of any appeals by Gould or Holywell of the orders of the Bankruptcy Court approving the sale of the Washington Properties, directing the proceeds to be placed in segregated accounts, and treating the proceeds as cash collateral of the Bank.

The Petitioners have also taken the position (Petition, pages 27-28) that the Bank's lien over the funds has never been conclusively decided. This too is inaccurate. In the Cash Collateral Order treating the Washington Proceeds as cash collateral of the Bank, the Court stated:

> The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.
>
> *The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties,* as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank

> of New York in subsequent appropriate proceedings.

(Emphasis added). [23a]. However, neither Gould, Holywell nor Twin ever appealed this order or contested the lien.

The Plan clearly stated that all of the Washington Proceeds would become part of the Liquidating Trust to be distributed to creditors by the Liquidating Trustee. [App. G-11, 14-15, 23, and 29-30]. The Bank's disclosure statement listed the exact amount of the Washington Proceeds, $32,422,798.37, which included the funds *transferred* by Twin to the Debtors. [App. G-11 and 14-15]. In the Plan, the Bank specifically stated: "The Bankruptcy Court has determined that the Washington Proceeds are BNY's cash collateral." [App. G-15].

The District Court reviewed Holywell's disclosure statement, the Debtors' proposed plans of reorganization, Gould and Holywell's statements that the sale of the Washington Properties would be beneficial to the creditors, and Gould's deposition testimony, and found evidence of willful representations that the funds would be under the control of the Debtors and subject to disposition by orders of the Bankruptcy Court. The District Court found that the Bank relied to its detriment on those representations. In addition, the District Court concluded that Gould and Holywell's failure to object and specifically contest the use of the Twin Cash under the Confirmation Order and other orders of the Bankruptcy Court regarding the Twin Cash evidenced improper conduct. The District Court concluded that, "by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel." [12a].

Even in the Petitioners' initial appeal from the Confirmation Order, in which no objection to the use of Twin Cash was made, the Petitioners admitted to having equity participations in the limited partnerships that owned the Washington Properties and that they realized approximately $32 million from the sale of these properties.

Petitioners challenge the District Court's conclusion that they acquiesced in the use of the Twin Cash under the terms of the Plan. (Petition, pages 27-29). The clear language of the Plan (served in early 1985) clearly provided for the use of the Washington Proceeds, which by definition included the Twin Cash:

> Upon the passing of title of Miami Center to BNY, BNY's liens and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY Holywell Loan and the *balance of the Washington Proceeds will be available for distribution to the creditors.*

(Emphasis added). [App. G-23]. In their primary appeal of the Confirmation Order, the Debtors (including the Petitioners herein) *never* challenged the use of the Twin Cash.

Further, neither Holywell, Gould nor Twin took an appeal from the Bankruptcy Court order approving the Liquidating Trustee's First Report filed on November 22, 1985. [App. N]. In the Report, the Liquidating Trustee clearly listed the Twin Cash as an asset subject to disposition by the Trustee.

Additionally, on December 30, 1985, the District Court remanded the Debtors' appeal from the Confirmation Order back to the Bankruptcy Court for the entry of more detailed findings of fact and conclusions of law. [App. M]. The Petitioners never took issue with the Plan's use of the Twin Cash despite the District Court's direction to raise any such

issue during the proceedings on remand. In the Bankruptcy Court's findings of fact and conclusions of law after remand [App. O], the District Court concluded that the Washington Proceeds (including the Twin Cash) were part of the Bank's cash collateral to be used to pay creditors. The District Court then affirmed the Bankruptcy Court's findings of fact and conclusions of law specifically noting that the Plan used "the proceeds of the sale by the Debtors of certain realty owned by them in Washington, D.C. ($32,000,000)." *Holywell Corp. v. Bank of New York,* 59 Bankr. 340, 345 (S.D. Fla. 1986). In their appeal to the Eleventh Circuit, which was dismissed as moot,[10] the Petitioners did not dispute that determination by the District Court.

The Bank detrimentally relied upon the Petitioners' representations and conduct as to the use of the funds. The District Court concluded that as a result of the Debtors' representations and conduct, the Bank did not object to the sale of the Washington Properties, and allowed a substantial portion of the Washington Proceeds to be distributed to the creditors pursuant to the Plan. [13-14a].

The decision of the Bankruptcy Court, the District Court, and the Eleventh Circuit Court of Appeals did not sanction the "improper use" of the assets of a non-debtor, or the "illegal substantive consolidation" of the assets of a non-debtor with a debtor. The Bankruptcy Court ruled in response to Gould's Emergency Motion for Clarification that the Liquidating Trustee was the only party that had control of the Twin Cash pursuant to the Plan. The orders of the Bankruptcy Court prior to confirmation and the provisions of the Plan clearly justified that holding. The District Court held that the Petitioners were "equitably estopped" from contesting the use of the Twin Cash. The record on appeal before the District Court justified this holding. The Eleventh

[10]*Miami Center*, 838 F.2d 1547.

Circuit ruled that the record before the District Court clearly supported the District Court's finding on the issue of equitable estoppel and that the Petitioners' other legal arguments were "frivolous."

The cases cited by the Petitioners in their Petition are inapposite. The Petitioners cite a line of cases to support a general legal principle that the assets of non-filed affiliated corporations cannot be used to satisfy the debt or claims against a debtor. The Bank does not dispute the validity of that principle. However, this is not the issue in this case. The issue in this case is whether the interrelationships of the Petitioners and Twin along with their actions in dealing with the Twin Cash and other actions by the Petitioners as set forth above made the Twin Cash available to pay the claims of creditors of Holywell pursuant to the Plan. The Bankruptcy Court and the District Court found that to be the case. The Court of Appeals affirmed.

The Petitioners also argue that *In re Texas Consumer Finance Corp.*, 480 F.2d 1261 (5th Cir. 1973) is analogous to the factual and procedural pattern of this case and should be dispositive. The Petitioners totally distort the holding of *Texas Consumer.* They fail to mention that in that pre-Code Chapter XI case, the Bankruptcy Court was statutorily without jurisdiction to affect the rights of existing shareholders. Prior to the enactment of the Bankruptcy Code, the rights of shareholders could only be affected under a plan in the context of a Chapter X proceeding. This distinction between Chapter X and Chapter XI with respect to altering the rights of shareholders has been abolished under the Bankruptcy Code and the holding in *Texas Consumer* is no longer viable.

The Petitioners, in their factual and legal analysis seek to confuse this Court. First, they raise a fictitious legal issue, i.e. the improper exercise of jurisdiction by the Bankruptcy

Court over the assets of a non-debtor, and, second, they erroneously assert that the decision of the Eleventh Circuit condoned such actions thus creating a conflict with other circuits with respect to this fictitious issue. This Court should ignore the Petitioners' attempted slight of hand. There is nothing complicated or unusual about the true issues decided by the Bankruptcy Court, the District Court, or the Eleventh Circuit Court of Appeals.

The Bankruptcy Court did not improperly authorize the seizure of the assets of a non-debtor or improperly substantively consolidate the assets of a non-debtor. The Bankruptcy Court made a fact-based finding that the Twin Cash was subject to the control of the Liquidating Trustee because it was an asset of Holywell specifically earmarked to pay the claims of creditors and passed to the Liquidating Trustee under the Plan. The District Court agreed with the Bankruptcy Court's conclusion and ruled that the record before it on appeal established that the Petitioners were estopped from contesting the Bankruptcy Court's decision. The Eleventh Circuit ruled that the record before the District Court abundantly supported its finding of equitable estoppel.

III.

The Ruling Of the Eleventh Circuit Does Not Sanction The Violation Of Certain Rules Of The Federal Rules Of Civil Procedure And Does Not Create A Conflict Among The Circuits

The Petitioners argue that the Eleventh Circuit's ruling sanctions the violation of Rule 8(c) of the Federal Rules of Civil Procedure which requires that an affirmative defense be asserted in a responsive pleading and of Rule 52(a) of the Federal Rules of Civil Procedure which requires that a trial court make specific findings of fact. These arguments are misguided because the action was initiated as a motion and

not as an adversary proceeding. Bankruptcy Rule 9014, which governs motions, limits the applications of both Rules 8(c) and 52(a).

The Petitioners contend that a conflict between the Eleventh Circuit and the other circuits exists regarding the District Court's *sua sponte* consideration of equitable estoppel. The Petitioners cite *In re Golden Plan of California, Inc.*, 829 F.2d 705 (9th Cir. 1986) and *In re Prestige Spring Corp.*, 628 F.2d 840 (4th Cir. 1980) in support of their argument that the Eleventh Circuit's *sua sponte* consideration of equitable estoppel is inconsistent with the Fourth and Ninth Circuits. An examination of these cases and the case at bar clearly demonstrates that the Petitioners have again created a non-issue and that no conflict exists requiring resolution by this Court.

A.

Rule 52(a)

The Eleventh Circuit's ruling did not violate Rule 52(a). Under Rule 52(a) and Bankruptcy Rules 9014 and 7052, specific findings of fact are not required or necessary in this case. On January 22, 1986, Gould filed an Emergency Motion for Clarification to clarify the right of the Liquidating Trustee to use the Twin Cash to pay creditors. Having brought a motion, as opposed to initiating an adversary proceeding, Bankruptcy Rule 9014 governed the Emergency Motion for Clarification. Bankruptcy Rule 9014 makes Bankruptcy 7052 applicable to contested matters, which, in turn, incorporates Rule 52. The last sentence of Rule 52(a) specifically states: "Findings of fact and conclusions of law *are unnecessary on decisions of motions under Rule 12 or 56 or any other motion* except as provided in Rule 41(b)." (Emphasis added).

The Emergency Motion for Clarification was not a motion under Rule 41(b), and therefore, the Bankruptcy Court was not required to issue any findings of fact. The content of the last sentence of Rule 52(a) is applicable to motions filed in bankruptcy cases. *See In re Campfire Shop, Inc.*, 71 Bankr. 521, 524, 525 (E.D. Pa. 1987); *In re Shariyf*, 68 Bankr. 604, 608 (E.D. Pa. 1986). Thus, the Bankruptcy Court did not have to issue findings of fact on the Emergency Motion for Clarification based upon the specific language of Rule 52(a).

Furthermore, the Petitioners cannot claim that the District Court erred in issuing a decision without receiving evidence or hearing testimony. In this case, the District Court was not a court of original jurisdiction, but, pursuant to 28 U.S.C. 158, was the initial court of review of the decision of the Bankruptcy Court. The District Court was not the proper forum to hold an evidentiary hearing on this issue. As the Eleventh Circuit properly noted, there was sufficient documentation presented to the District Court on appeal to support the District Court's findings that the Petitioners were equitably estopped from contesting the use of the Twin Cash by the Liquidating Trustee.

B.

Rule 8(c)

The Petitioners' claim that the District Court exceeded its authority by making the *sua sponte* decision to invoke the doctrine of equitable estoppel. Petitioners claim that this is a violation of Rule 8(c) of the Federal Rules of Civil Procedure because estoppel is an affirmative defense which must be pleaded and proved in the court of original jurisdiction.

Petitioners' reliance upon Rule 8(c) is misguided in this case. Rule 8(c) applies only to actions instituted in the District Court or *adversary proceedings* instituted in the Bankruptcy

Court pursuant to Bankruptcy Rule 7008. *In re Farmers' Co-op of Arkansas and Oklahoma, Inc.*, 43 Bankr. 619 (W.D. Ark. 1984). This argument fails to recognize that Gould filed a motion governed by Bankruptcy Rule 9014 and did not initiate an adversary proceeding. As such, Bankruptcy Rule 9014 governs the motion. Bankruptcy Rule 9014 provides in material part: "No response is required under this rule unless the court orders an answer to a motion."

Bankruptcy Rule 9014 incorporates a number of rules relating to adversary proceedings, but not Rules 7008 or 7012, which would have required the responsive pleading of an affirmative defense. This specific exclusion is in recognition that Rule 9014 does not require a formal response unless the court orders an answer to the motion. The Bankruptcy Court did not order the Liquidating Trustee or the Bank to respond to the motion. Because there was no requirement to file a responsive pleading to the motion, the failure of the Bank or the Liquidating Trustee to raise equitable estoppel in a responsive pleading cannot act as a bar to the District Court's review and consideration of that basic legal principle.

The cases cited by the Petitioners—*Golden Plan* and *Prestige Spring*—were concerned with *adversary proceedings*, and therefore are not applicable. Furthermore, these cases involved fraudulent conveyances which are specifically governed by the procedures of Bankruptcy Rule 7001 which requires the initiation of *adversary proceedings*. Adversary proceedings, in turn, are subject to the pleading requirements of Bankruptcy Rule 7008. Bankruptcy Rule 7008, which incorporates Rule 8, is *not* incorporated into Bankruptcy Rule 9014 and therefore is not applicable to motion practice. Because no response was required to the Emergency Motion for Clarification, Petitioners cannot argue that the failure to raise the defense of equitable estoppel in the Bankruptcy Court is a bar to its consideration by the District Court.

CONCLUSION

Based on the foregoing reasons and authorities, this Court should deny the Petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of August, 1988, a true copy of the foregoing was furnished by mail delivery to:

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